THE LEGAL LITERATURE OF THE WAR.

"IN THE midst of scenes of war and outrage, in which the fields of Europe were drenched with blood and its cities blackened with executions," Hugo Grotius, writes his most recent biographer, "went forth to struggle for the redemption of civilization from the curse of useless battle;" [1] and in 1625, before the greatest horrors of the Thirty Years' War had occurred, published his *De Jure Belli ac Pacis* from which must be dated the beginning of international law as a scientific study. From the Peace of Westphalia in 1648, the terms of which were due in large part to Grotius' momumental work, dates the modern, secular system of states, with territorial sovereignty, theoretical equality, permanent interstate relations, and subject to a law of nations.[2]

The motives which actuated Grotius in writing his epoch-making work are fully stated in his *Prolegomena* to *De Jure Belli ac Pacis.*[3] The "law," he said, "which regards the relations between peoples, or between rulers of peoples, whether it proceed from nature or be instituted by divine commands [4] or introduced by custom and tacit agreement, has been touched on by few, and has by no one been treated as a whole and in an orderly manner. And yet that this be done is of concern to the

[1] HAMILTON VREELAND, JR., HUGO GROTIUS: THE FATHER OF THE MODERN SCIENCE OF INTERNATIONAL LAW, p. 241 (New York: Oxford University Press, 1917).

[2] See SIR HENRY MAINE, ANCIENT LAW, chapter iv; WESTLAKE, INTERNATIONAL LAW, part i, p. 44.

[3] The following quotations are taken from the translation in COKER, READINGS IN POLITICAL PHILOSOPHY, p. 259ff.

[4] Mr. Vreeland in the biography from which I have quoted explains how Grotius based his theories upon "natural law," but a better statement will be found in Sir Henry Maine's ANCIENT LAW, chapter iv, upon which Mr. Vreeland relies almost wholly. There is also a very clear account in Professor Goudy's introduction (p. xixff) to volume ii of the papers on PROBLEMS OF THE WAR read before the Grotius Society in 1916 (London, 1917). These two volumes of papers, as will appear from their more detailed consideration later, treat the legal problems of the war in a very admirable manner.

human race." In the second place, he said, "such a work is the more necessary because of the fact that persons in our own time, as well as in former ages, have held in contempt what has been done in this province of jurisprudence, as if no such thing existed, except as a mere name." [5]

And, finally, the period of European history of which Grotius was a spectator, was by all odds the most terrible in extent, devastation, sacrifice of life, and barbaric practices that the world had then known. Grotius began his work in 1604 and when it was finished in 1625 the Thirty Years' War was yet to run an even more terrible course; but apart from this, there had been civil war in France with the assassination of Henry III and Henry IV, disorder in Holland and England, with the assassination of William of Orange and Mary Stuart, and twenty-five years of the war by the United Provinces against Spain. Little wonder was it therefore that Grotius could write in his *Prolegomena*:

> "I have had many and grave reasons why I should write a work on that subject. For I saw prevailing throughout the Christian world a licence in making war of which even barbarous nations would have been ashamed, recourse being had to arms for slight reasons or for no reason; and when arms were once taken up, all reverence for divine and human law was lost, just as if men were henceforth authorized to commit all crimes without restraint." [6]

Two of Grotius' reasons for writing his work have a curious pertinency now. International law has been treated as a whole and in an orderly manner by a legion of writers, but when the present conflict began, and exposed the political theories which are ultimately behind the German attempt at world power, the callous disregard for international law shown in the

[5] For the literature of international law before Grotius, see HOLLAND, STUDIES IN INTERNATIONAL LAW, pp. 1-58; WALKER, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA, pp. 1-67.

[6] What rules of international law there were, before the time of Grotius, to govern the relations of states, will be found discussed by SIR HENRY MAINE, INTERNATIONAL LAW, lecture i; PHILLIPSON, INTERNATIONAL LAW, AND CUSTOMS OF THE GREEKS AND ROMANS (2 vols.); WALKER, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA, vol. i, and VREELAND, *op. cit.*, p. 174.

instructions issued for the German armies before the war,[7] and a long list of violations excused either as necessary or retaliatory, many began to ask whether international law had not ceased to exist; whether its repeated violation with no effective sanction to compel compliance did not make the outlook very dark for the future, and whether it would not be better to recognize that interstate relations were simply controlled by a jurisprudence of highwaymen, and prepare for a regime of international anarchy during which armaments would be the only safeguard.[8] These doubts have by no means been confined to apologists for the German violations of international law; many, while condemning the German invasion of Belgium, the ensuing atrocities, the inhuman warfare on the high seas, the revolting reprisals, have wondered whether resort could in the future be made to international law. Such an attitude is natural since before the war the majority of laymen and not an inconsiderable number of lawyers paid but little attention to the rules governing the relations between states. It was a shock to them to discover that what they had known as international *law* had no effective sanction; that it could be disregarded and violated with impunity, and that the injured nation, if a belligerent, could only resort to further violations justified as reprisals, or if a neutral, could itself enter the war in order to force compliance.

It should be recognized, however, that these criticisms state

---

[7] See MORGAN, THE WAR BOOK OF THE GERMAN GENERAL STAFF, *passim*.

[8] CF. the following: "What strikes me as one of its [the war's] saddest features is the comparative indifference with which well established rules of International Law have been violated by each and all of the belligerents, when they have run counter to their apparent material interests. The loss of moral force and self-respect by the wrong-doing State seems to be regarded as unimportant when set off against its material interests. Thus, the carefully-drafted rules of the Hague Conventions and the Declaration of London have been in large measure, to use a vulgarism, "scrapped"; even the time-sanctioned Declarations of the Treaty of Paris have not, in the matter of blockade, escaped violation. Excuses and defenses for such violations have, no doubt, been set up, but as a rule they are of a kind that International Law ought emphatically to reject." Professor Goudy's Introduction, to PROBLEMS OF THE WAR, vol. i, pp. 13-14 [papers read before the Grotius Society, London, 1915].

something more than is really the case since no one doubts that when peace is restored international rules will be observed, and that even now the anarchy which prevails is solely on account of the practices of one group of belligerents. Neutrals have in this war strictly lived up to their duties; they have had their recognized privileges seriously infringed and demands made of them that they relinquish certain fundamental rights on the high seas. Their refusal has added to the number of belligerents. But similar infringements and protests have been an incident of every great war; the armed neutralities and the protests made by the United States during the Napoleonic wars are evidence, I think, that then, as now, belligerents are ever ready to advance their own interests at the sacrifice of neutral right—and it may be, as now, every dictate of humanity. The anarchy of this war, even though approved by the political philosophy of Germany, ruthlessly begun by the invasion of Belgium, and greater than anything that was dreamed to be possible, does not, I think, augur so very unfavorably for the future of international organization. Analogies in the municipal law and the opinions of publicists who began to speak as soon as the attacks on international law commenced, all conform to this view; and it is even probable that the conclusion of peace will establish international law on firmer foundations. As a writer in the *American Journal of International Law* has said:

> "The recurrence of war affords no more reason for losing faith in international law than the recurrence of private crime would be a justification for abolishing domestic law and substituting a reign of internal anarchy. Just as a repetition of private crime moves us to increase our legal safe-guards to private life and property and points the way, so also does the recurrence of war result in the strengthening and developing of the legal principles which nations have adopted as a check on international crime. The action of one nation or of any group of nations, cannot in one night undo a collective work of all the nations extending over a period of time measured by centuries." [9]

[9] "The Effect of the War on International Law," 9 AMERICAN JOURNAL OF INTERNATIONAL LAW, pp. 475-476 (April, 1915).

Former United States Senator Elihu Root, referring in his address as President of the American Society of International Law (1915) to the fact during the appalling crimes of the Thirty Years' War the science of international law first took on form and authority, goes on to say hopefully:

> "The moral standards of the Thirty Years' War have returned again to Europe with the same dreadful and intolerable consequences. We may hope that there will be again a great new departure to escape destruction by subjecting the nations to the rule of law. The development and extension of international law has been obstructed by a multitude of jealousies and supposed interests of nations, each refusing to consent to any rule unless it be made most favorable to itself in all possible future contingencies. The desire to have a law has not been strong enough to overcome the determination of each nation to have the law suited to its own special circumstances; but when this war is over the desire to have some law in order to prevent so far as possible a recurrence of the same dreadful experience may sweep away all these reluctances and schemes for advantage and lead to agreement where agreement has never yet been possible. It often happens that small differences and petty controversies are swept away by a great disaster, deep feeling, and a sense of common danger. If this be so we can have an adequate law and a real court which will apply its principles to serious as well as petty controversies, and a real public opinion of the world responding to the duty of preserving the law inviolate. If there be such an opinion it will be enforced." [10]

Many other writers could be quoted to the same effect. Sir Frederick Pollock declares himself "sanguine enough to hope that in the compass of five or ten years after" a definite peace between the present belligerents "those of us who are still living may see the foundations of an authentic international law, protected by organized international justice, well and truly laid." [11] Sir H. Erle Richards, Chichele Professor of Interna-

---

[10] Root, "The Outlook for International Law," 10 AMERICAN JOURNAL OF INTERNATIONAL LAW, 1, 10.

[11] Pollock, "What of the Law of Nations," THE FORTNIGHTLY REVIEW, January, 1917.

tional Law at Oxford University, confidently declares that International Law still exists and anticipates

> "that after the end of this war it will stand on a more secure footing than before. We cannot yet hope that nations will dispense with armaments: we have had too sharp a lesson to allow us to rely altogether on treaties or agreements, at least for some time to come; but we can hope that at the end of the war the public opinion of the world will declare in no uncertain tones that the clear principles of the law must never again be set aside as of no account, and that among nations, as among men, good faith must be observed." [12]

Another eminent English authority—Dr. A. Pearce Higgins, Lecturer on International Law at the London School of Economics and the Royal Naval War College, writes as follows:

> "We do well to cherish high ideals for the future of international relations, but it is necessary that these ideals should be those not of one State only but of all the members of the international society. The Law of Nations can only progress and develop as the ethical standard of each State is steadily elevated. The death blow must be given everywhere to the anarchical doctrine that might is right, that war is a necessity to political idealism and politics *par excellence,* instead of being the evidence of the failure of diplomacy and the last resort in case of the clash of irreconcilable national ideals. If the present war results in the firmer acceptance of the sanctity of treaties, the complete destruction of the German doctrine of necessity justifying any and every breach of the laws of war, guarantees the safety of small States and provides means for a more general acceptance in international disputes of the Law of Nations, applied by an international body in lieu of the arbitrament of the sword, it will not have been in vain, and it will form a notable epoch in the development of the Law of Nations and the civilization of the world." [13]

Sir John Macdonell, in a thoughtful article that merits ex-

[12] RICHARDS, "DOES INTERNATIONAL LAW STILL EXIST?, p. 17 (Oxford Pamphlets, 1914).

[13] HIGGINS, THE LAW OF NATIONS AND THE WAR, pp. 28-29 (Oxford Pamphlets, 1914).

pansion into a complete consideration of all the points involved, is also hopeful:

> "There is no need for despair. In the first place, there is the ever increasing intercourse of nations in time of peace, which this war cannot permanently interrupt or diminish. Steam, electricity, the telephone and many other modes of communication necessitate the adoption of common rules. The industrial and financial world is more and more organized, if the political is not. Then, too, there is—and it works for solidarity more than even the necessities of trade—there is something which may be called the formative sense of justice; that which, whenever men, few or many, are habitually brought together, establishes practices and customs hardening into law. That sense of justice affects even its worst enemies. The marvelous copiousness of the terminology of political hypocrisy, the homage paid by evildoers to better things, the pains always taken to prove that States are acting in accordance not with the low, but with the higher standards, the eagerness with which they seek to demonstrate that their worst conduct is justified by the rules of International Law—these facts * * * show also the recognition of that higher standard. The violators of International Law are, even in these days of examples of barbarism, generally on the defensive. Its very enemies testify to the presence of that sense of justice which first created International Law, and which will perpetuate it." [14]

And finally, Dr. Coleman Phillipson, also an Englishman, who has written the most exhaustive survey of all the problems of international law involved by the war, is, even after enumerating without reserve the extensive violations, still very sanguine:

> "Despite the numerous breaches of international law that have been committed, we need not despair of its future. Those who have traced its course of development, who have noted its trials and tribulations, its failings and its triumphs, are sure that its inherent vitality will never and can never be entirely destroyed, and are confident that, notwithstanding the many wounds inflicted on it during

[14] MACDONELL, "Seven Postulates of International Law," CONTEMPORARY REVIEW, January, 1916. See also his introduction to PHILLIPSON, INTERNATIONAL LAW AND THE GREAT WAR.

> the war, it will rise again healed and invigorated, and will assume its inalienable dominion over the Society of States. Where there is life, where there is a nation, where there is a community of States there must be restraint, discipline, law. The existence of international law, then, is inevitable. Every infringement of it that is recognized as such implies its existence, its validity, and its applicability. The main problem to which men and nations should devote themselves is how to fortify it by such potent sanctions as will make its violation not merely dishonourable, but unprofitable to an offending member of the community of States." [15]

These opinions have been set forth, perhaps at too great length, to show that there is still optimism among the leading authorities on international law, the writings of none of whom have in the past been marked by an excessive hope for the future of international organization and the abolition of war. As is entirely natural, the opinions are not in agreement as to the reasons why international law will be strengthened after the conclusion of the attacks on it. But there are certain indisputable facts which stand out from the anarchy of the present struggle and, in addition to contradicting the all too prevalent expressions as to the permanent character of the disrespect for international law, augur hopefully for the future.

In the first place, as I have said, neutrals have almost without exception—certainly without material exception—lived up to their international obligations themselves and have insisted, too frequently in vain, that the belligerents do the same. Belgium led the way when M. Davignon, her Minister for Foreign Affairs, refused the demand of Germany for a free passage on the ground that "the acceptance of the proposals would sacrifice the honour of the nation and betray their duty towards Europe." [16] England entered the war because of the invasion of Belgium in violation of the Treaty of 1839 and her statesmen in reiterating their war aims paraphrase Gladstone's hope expressed in 1870 at the time of the Franco-Prussian War: "The greatest triumph of our time will be the enthronement of the idea of public right as the governing idea of European pol-

[15] PHILLIPSON, *op. cit.*, p. vi. [16] BELGIAN GREY BOOK, No. 22.

itics." The United States, finally, and other neutrals, were drawn into the struggle on account of Germany's invasion of their sovereign rights. To be sure, after our entrance, we assimilated in large measure the case of the Entente Allies, and there are very substantial grounds, other than the legal one, upon which our case against Germany may be rested. But it was simply one phase of Germany's brutish disregard of human rights everywhere—the assassination, not alone on the high seas, of noncombatant citizens of both sexes and all ages —which so aroused the indignation of America that war was inevitable. Mr. Wilson's protests were in part calculated to stay an international ruthlessness which demanded our condemnation and threatened, if it did not already directly affect, our interests. But the repeated disregard by Germany of legal rights was responsible for the moral indignation which made war inevitable. On our part also, therefore, the war is primarily one to enforce the observance of international law in the future.

There have been, secondly, repeated and unmistakable evidences that even in the most extreme barbarous practices to which Germany has resorted, her jurists and statesmen have attempted to argue that international law was still being observed, and there is no question but that the moral isolation in which Germany now stands, is, from her point of view, considered unjust and bitterly resented. The notes to the United States on the submarine controversy express in fulsome terms Germany's regard for international law in the past and her compliance with it in the incidents complained of—modifications of the rules being justified on account of the newness of the submarine, necessity, and as reprisals for England's extensions of international law. With reference to the violation of the rules concerning warfare on land—the use of prohibited weapons, the illegal and inhuman treatment of occupied districts, the bombardment of unfortified places, etc.—the same excuses cannot be made; but in many cases Germany does attempt to exculpate herself, not on the ground that in accordance with her political philosophy she is not bound by international law, but that the rules were not applicable or that the

facts complained of are otherwise—as for example, that a particular Hague Convention was not agreed to by all the belligerents, or that a particular place was fortified, or that the bombardment of it was incidental and unintentional, and so on, *ad nauseam*. Public opinion is still a sufficient sanction for international law to make a belligerent which has violated almost every principle seek to escape moral condemnation, although it is not a sufficient sanction to compel compliance in order that an offender may not become a pariah among states.

Finally, judging by the number of schemes to prevent future conflicts and the number and character of the political thinkers who are devoting their energies to a consideration of this problem, "In time of peace prepare for war," seems to have become a maxim as generally accepted as its converse which has dominated foreign policies since the dawn of history. And it is a characteristic of all these schemes to insure peace that the strengthening of international law, its revision, and perhaps codification by international congresses or even a permanent international legislature, is considered fundamental. It would be tedious to enumerate all these proposals. From the pacifist English Union for Democratic Control which has been unable for sometime to send its publications to interested individuals in the United States, and the English League of Nations propaganda which has received the distinguished approval of Lord Bryce, to the American People's Council and the League to Enforce Peace—all look confidently to the future of international law. The projects which have received the greatest support—like the programme of the League to Enforce Peace—would give international law some collective sanction; at least they would secure joint action in order to compel the submission of disputes to a Court of Arbitration or a Council of Conciliation.

The fourth proposal of the American League to Enforce Peace is that "Conferences between the signatory powers shall be held from time to time to formulate and codify rules of international law, which unless some signatory shall signify its dissent within a stated period, shall thereafter govern in the de-

cisions of the Judicial Tribunal" that is to be instituted.[17] The English League of Nations Society suggests the same agreement in almost identical language,[18] and the third point of the Minimum Programme of the Organization Centrale pour une Paix Durable is that the work of the Hague Conferences be developed, with periodic sessions.[19] These three groups accept the principle of a collective sanction, but others, equally desirous of preserving the peace of the world, yet balking at the paradox of approving war in order to prevent war, deem it fundamentally necessary that international rules be further developed. Thus the recommendations of the American Institute of International Law on International Organization stress "the creation of an enlightened public opinion in behalf of peaceable settlement in general" and in behalf of the specific recommendations made for a court to which will be submitted all disputes, "in order that, if agreed to, they [the Institute's proposals] may be put into practice and become effective, in response to the appeal to that greatest of sanctions, 'a decent respect to the opinions of mankind.'" [20]

---

[17] GOLDSMITH, A LEAGUE TO ENFORCE PEACE, p. xxi.

[18] League of Nations Society, Publication No. 16 (PROCEEDINGS OF THE FIRST ANNUAL MEETING, July 20, 1917), p. 3 (London, 1917).

[19] UNE PAIX DURABLE: COMMENTAIRE OFFICIEL DU PROGRAMME-MINIMUM, p. iv (The Hague, 1915).

[20] THE RECOMMENDATIONS OF HABANA CONCERNING INTERNATIONAL ORGANIZATION, p. 77 (1917). To give another illustration, Dr. W. Evans Darby (known in the United States as the author of a useful although inaccurate book, INTERNATIONAL TRIBUNALS) avowedly writing as a layman and a pacifist opposes any collective use of force as contemplated by the programme of the League to Enforce Peace. But although he disapproves of the proposed *sanction*, he is eager for the future development of international law and even for a federation of nations. "Without law the Society of Nations will be incomplete and impossible, and by means of its development the character of that Society will be determined. The creation of the International Code and the development of the International Society will proceed *pari passu*, the one dependent upon the other. But it is not the big stick in the strong hand that will secure the agreement and coöperation of the members. The habit of law and of obedience to law has to be formed, and that is not a veneer or a polish that may be applied: it must grow out of the life." ("The Enforcement of the Hague Conventions," in PROBLEMS OF THE WAR, vol. ii, pp. 153-154 [Grotius Society Papers, 1916].)

Even an examination of the various proposals for peace recently put forth by Germany would show a frequent concern for the future development of international law, in some cases, to be sure, to sanction Germany's ill-gotten gains, but also to protect (!) her against further aggression. Thus, in April, 1915, Dr. Bernard Dernburg, at that time chief apologist for Germany in the United States, announced apparently official peace "feelers" the fourth of which was that international law should be codified, with guarantees to save all neutrals from implication in wars in which they do not wish to take part." [21] Again, the resolutions adopted on July 19, 1917, declared that "The Reichstag will energetically promote the creation of international juridical organizations." [22]

The preservation of the future peace of the world, it will be admitted on all sides, is the most important problem that will have to be considered by the conference which sits at the conclusion of this war. "The Congress of Westphalia, which ended the Thirty Years' War, marks an epoch in international relations, and it may well be that the peace which ends the present unfortunate war, and the means taken to prevent the violation of its terms, will likewise mark a new era in international relations. If international law, in the sense in which we understand it, entered into the practice of nations with the peace of Westphalia, the enforcement of international law may date from the peace which we hope may not be long deferred." [23]

It is not probable that another Grotius has yet appeared to write a monumental work from which will date a new science of international law, with an effective sanction, or in accordance with whose principles a peace, marking a new state system, will

[21] R. S. BOURNE (ed.), TOWARDS AN ENDURING PEACE, p. 214 (New York, 1916).

[22] NEW YORK TIMES CURRENT HISTORY, August, 1917, p. 195. Herr von Bethmann-Hollweg in a speech to the Reichstag Committee on November 9, 1916 declared Germany to be "ready at all times to join a League of Nations and even to place herself at the head of a league which will restrain the disturber of peace." Quoted by H. N. BRAILSFORD, A LEAGUE OF NATIONS, p. 18, note (Macmillan, 1917).

[23] "The Effect of the War on International Law," 9 AMERICAN JOURNAL OF INTERNATIONAL LAW, 478.

be declared. But there has been during the last three years a number of very able publications assessing the nature of international law at the beginning of the war, the character of the violations, and the reasonable hopes that may be entertained for the future. This literature can hardly be overlooked when attempts are made to give to international relations new and more permanently pacific character, and it may be worth while, therefore, without professing to make any original contributions to the solution of the problems discussed, to consider some of the legal literature of the war, and what it says concerning the past and future of the law of nations.

II

One of the most prolonged, bitterly fought, and essentially unimportant controversies in the literature of international law is whether the rules which are admittedly in existence, generally recognized, and more or less binding upon the conduct of civilized states, have a *legal* nature. As Lawrence very accurately says: "The controversy as to whether the term law is properly applied to the rules of international conduct is a mere logomachy. If we hold that all laws are commands of superiors, international law is improperly so called. If we hold that whatever precepts regulate conduct are laws, international law is properly so called." [24] Yet it is a fact that, unlike municipal law, which is promulgated and enforced by parliaments, executives, and courts, international rules come into existence through custom and agreement and for the enforcement of them there is no collective sanction, no power above the states which have entered into a particular agreement, but simply the

[24] PRINCIPLES OF INTERNATIONAL LAW, p. 15. International law has probably been harmed by the extravagant claims made for its *legal* nature. Little is accomplished by attempting to show, as does Phillipson, that: "Not all law is bound to satisfy the hard-and-fast requirements of the Austinian analysis. These clearly and sharply defined requirements are not even applicable to all branches of municipal and constitutional law; they are certainly much too narrow to cover the different circumstances incidental to international relationships. The mere form of the sanction is immaterial. The criterion of immediate enforceability by a determinate sovereign is not absolutely essential to all binding rules." (INTERNATIONAL LAW AND THE GREAT WAR, p. 49.)

fear of an unfavorable public opinion and the use of self-help, which, at no time theoretically satisfactory, have been proved woefully inadequate by the experiences of this war. To say this is not to scorn international law or to be pessimistic about the future, but simply to state undeniable facts that must be reckoned with. They are clearly shown by two recent monographs which do not discuss the question of definition but simply the relations of international law and municipal law.

Mr. Cyril M. Picciotto, a Whewell (International Law) scholar at Cambridge University, after investigating exhaustively the opinions of text-writers and courts on *The Relation of International Law to the Law of England and of the United States of America* [25] comes to the conclusion—which was, to be sure, generally accepted before—that an Act of Parliament prevails even though it be in conflict with a rule of international law; that a treaty affecting the private rights of British subjects is not binding upon the courts without an Act of Parliament; nor is a treaty which conflicts with statute law, although a treaty adds to the international law which will be applied by a court of prize; that a rule of customary international law will be regarded as part of the law of the land and enforced only if it has received the assent of the country, or the proposition is of such antiquity and generality that the assent of the country may be assumed, and that, finally, enacted law, whether by Act of Parliament or order in council, will be construed on the presumption that no discrepancy between municipal and international law is intended.

As far as the United States is concerned, a treaty made by the President and ratified by the Senate is, according to the Constitution, part of the law of the land and on the same level as an Act of Congress—an earlier statute being overruled by a later treaty and an earlier treaty overruled by a later act of Congress. Either a treaty or an act of Congress overrules customary international law, although this will, in the absence of any statutory rule, be recognized and applied in the courts. Acts of Congress are construed with the presumption that no

[25] New York: McBride, Nast & Company, 1915, pp. 128 (with an introduction by Professor Oppenheim).

violation of international law has been intended. This exact statement of the relation of international law and municipal law, as binding upon England and the United States, shows a desire to preserve and recognize international law as far as may be possible, yet the conclusion is indisputable that whenever it is deemed advisable, legislatures can set aside rules of international law that have been expressly agreed to. And so long as this is the case, it matters not whether the rules have a legal nature; the paramountcy of municipal law is the important thing, and the lack of recognition accorded this principle before the present war has been in part responsible for the pessimistic views as to the chaos wrought by the present international practices.

The second monograph, *The Enforcement of International Law through Municipal Law in the United States*,[26] by Dr. Philip Quincy Wright, was probably prepared with little reference to the war, but its conclusions are of great interest. He conceives international law as prescribing rules of conduct for persons and public officers and imposing obligations upon states to enforce them, and proceeds to consider "the rules of municipal law enforced in the United States in pursuance of this international obligation." Thus, there is no difficulty in showing that international law and municipal law are not mutually exclusive; they may prescribe the same rules, but—with reference to violations of neutrality for example—the municipal regulation has a criminal penalty, while the international rules require the state whose citizens have offended, to make reparation to the aggrieved state for not preventing such acts. International law can be enforced only through municipal law; and it is a matter of legal discretion for each state as to how far this enforcement will be made.

But, more important perhaps than these inherent deficiencies of international law is the fact that some of its postulates are logically untrue, or not in consonance with the realities of political existence today. Some of these postulates do not concern us, but several may be mentioned. International law de-

[26] University of Illinois Studies in Social Sciences, vol. v, No. 1, March, 1916, pp. 264.

pends upon the existence of a society of nations which have given their consent to various rules. But "even in peace the so-called society of nations is of a very loose rudimentary order; there is agreement, no doubt, as to many matters, but with many points of repulsion; a society, if such it can be called, the members of which have different ideals, different culture, many antagonistic aims, and no common superior. Such it is in peace; it comes to an end in time of war." And when we look at the facts, it "is not a true, highly organized society of nations, with a code of common rules universally accepted, but groups of nations, some of these groups fairly stable, others loosely knit and temporary, with rules many, but not all of them generally accepted. We see certain rules (*e. g.*, those as to the position of ambassadors) universally adopted; others accepted by a majority; others only by a few; some, especially of late, questioned." [27]

There is, furthermore, and perhaps this is more important, no agreement as to the rights which the members of this imperfect society of nations possess. Text-writers are eloquent in stating some of these fundamental rights, and recently the American Institute of International Law, composed of five publicists from each of the international law societies of the twenty-one American Republics, has announced a declaration of the rights of nations, more elaborate and with more distinguished sponsorship than any previous attempt at formulation.

The five fundamental principles are as follows:

"1. Every nation has the right to exist, to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the state to protect itself or to conserve its existence against innocent and unoffending states.

"II. Every nation has the right to independence in the sense that it has a right to the pursuit of happiness and is free to develop itself without interference or control from other states, provided that in so doing it does not interfere with or violate the rights of other states.

"III. Every nation is in law and before law the equal of every other state composing the society of nations, and all

[27] Sir John Macdonell, "Seven Postulates of International Law," CONTEMPORARY REVIEW, January, 1916.

states have the right to claim, and according to the Declaration of Independence of the United States, 'to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them.'

"IV. Every nation has the right to territory within defined boundaries and to exercise exclusive jurisdiction over this territory, and all persons, whether native or foreign, found therein.

"V. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe." [28]

This declaration is accompanied by an official commentary which professes to find these rights stated in decisions of the Supreme Court of the United States. That, however, as must be evident, does not give them any validity as principles of international law. Grotius drew his work largely from the "law of nature" but three centuries after Grotius, with writers on political philosophy substantially agreed that the "law of nature" is a myth and that man has no natural rights, it is hardly a method that will appeal to reason to base such a declaration upon the outgrown conceptions of the Declaration of Independence. Nor is the analogy exact when the subjects of municipal and international law are considered. A natural person is mortal, physical, and movable; a state is immortal, artificial, and immovable. And finally, such a declaration denies undisputed facts of political existence today. Equality is not the same in all the states of the world; nor is it the same in the society of nations.[29] Where individual rights conflict with the rights of

[28] "The American Institute of International Law," 10 AMERICAN JOURNAL OF INTERNATIONAL LAW, 125.

[29] "This doctrine was never true in law or in fact. It was never true of the large number of so-called semi-sovereign States. It was not true of States which were guaranteed, and, as such, often debarred from exercising important sovereign powers. In fact, we find at all times a division between the small and the great States exercising singly or in concert influence in excess of others. What is also at variance with this theory is the doctrine, espoused and put in practice in some quarters, that small States, unable to protect themselves, ought not to survive in the struggle for existence." (Sir John Macdonell, *op. cit.*)

society in municipal law, the former must give way; but this declaration does not admit that the rights of the world may be paramount to the right of one nation. It presupposes a static world, and it has been the static character of international law, not developing to cover disputes capable of equitable determination by the existing principles of international law, that has been partly responsible for the fact that law has not been substituted for war.

A detailed criticism of this declaration need not be made. Enough has probably been said to show that it by no means furnishes the necessary postulate for international law—that states have certain rights. What these rights are will have to be defined more accurately, more in consonance with political facts, in a manner that will allow for change, and that will receive substantial approval by the states of the world. The theories of the American Institute, it may be added, have already been departed from by the United States in its negotiation of treaties with Latin American states which give the United States the right of intervention in return for the promise of protection.

A recent writer argues in an original and searching book that we need to modify very radically this postulate of international law. The inherent rights of states, he says, must be reduced to inherent "values." "The right to exist springs from the mutual recognition which States accord to each other as a guarantee of their separate freedom." It is not absolute, but is qualified by the proper behavior of a State and the proper maintenance of a separate existence. The right of independence merely means "the possession of a distinct international personality"; sovereignty has no significance apart from the idea of independence, and "equality is evidently nothing more than the claim of nations to an equal right of recognition, and to the respect due them as separate political personalities. It belongs rather in the realm of international etiquette than International Law." [30]

[30] (BROWN, INTERNATIONAL REALITIES, pp. 72-74 (New York: Charles Scribner's Sons, 1917). "Our task, therefore, as defenders and upbuilders of International Law, becomes one of determining the specific

It should be said, finally, that international law has in the past been too much concerned with war. The Hague Conferences agreed to rules regulating violence without taking any effective measures to prevent the violence. This, however, could not of itself account for the extensive violations of the rules concerning warfare on land and sea. They have been justified by an appeal to Machiavelli rather than Grotius—that the doctrine of military necessity is paramount.

Lindsay Rogers.

UNIVERSITY OF VIRGINIA.

(To be continued.)

---

mutual interests which nations are prepared to recognize; and then to endeavor, in a spirit of toleration, friendly concern, scientific open-mindedness, to formulate the legal rights and obligations which these interests entail. Having come to a substantial agreement concerning the law itself, we may then properly turn to the task of securing the most effective agencies for its interpretation and enforcement.

"The nations of the earth are far from ready to be ruled by a common, sovereign, political authority. Their interests and ways of thinking are too antagonistic for that. The great preliminary work of facilitating closer relations, of removing misunderstandings, of reconciling conflicting points of view, of identifying various interests, of fostering common conceptions of rights and obligations, remains yet to be done." (*Ibid.*, pp. 21-22).